BDP-SPS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10646 OF 2019

Maharashtra Krishna Valley
Development Corporation, Pune,
Through the Executive Engineer …. Petitioner.
V/s.
B.T. Patil & Son
Belgaum (Consti.) Pvt. Ltd. & Anr. …. Respondents.

Mr. Sachin Gite for the Petitioner.
Dr. Virendra Tulzapurkar, Senior Counsel i/b Mr Mandar Soman for Respondent No.1.

CORAM: NITIN W. SAMBRE, J.

Order reserved on 11/10/2019
Order pronounced on 24/01/2020

P.C.:-

1] This Petition is by State's statutory Irrigation Corporation. Petitioner suffered an Arbitration Award whereby claim of Respondent-Contractor to the tune of Rs 5,40,44,163/- came to be allowed on 18/10/2011. The present Petitioner filed an application under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to for the sake of brevity as "the Act") before learned District Court, Satara challenging the aforesaid Award on 17/11/2011.

2] Petitioner thereafter preferred an application under Order VI Rule 17 of the Civil Procedure Code, seeking amendment to the application filed under Section 34 of the Act on or about 30/3/2017. The said application-Exhibit-95 seeking amendment to the application preferred under Section 34 came to be rejected vide impugned order dated 6/8/2019. As such, this Petition.

3] Heard Shri Gite, learned Counsel for the Petitioner and Dr. Virendra Tulzapurkar, learned Senior Counsel appearing on behalf of the Respondent No.1.

4] The submissions of Mr. Gite are, amendment which is sought to be moved is with bonafide intention on behalf of State's statutory Corporation so as to strengthen earlier grounds and, in no way, same can be read as changing nature of claim or challenge put-forth under Section 34 of the Act. Drawing support from the judgment of this court in the matter of *Sanjay Suganchand Kasliwal vs. Jugalkishor Chhaganlal Tapadia & anr.*[1], submissions of Mr. Gite are, at the stage

1 2015(7) Bom. C.R. 448

of deciding application for amendment, Court need not go into correctness or falsity of the case and such application is required to be decided on parameters as to whether amendment is necessary and whether Respondents would be taken by surprise by such amendment, as it changes nature of the pleadings. He also placed reliance on the judgment of the Apex Court in the matter of *State of Maharashtra vs. Hindustan Constructions company Limited*[2] so as to claim that it was never an intention of the legislature not to permit amendment to Section 34 application. He would draw support from the observations made in paras 29 and 32 of the said judgment, which read thus:

> "29. There is no doubt that the application for setting aside an arbitral award under Section 34 of the 1996 Act has to be made within the time prescribed under sub-section (3) i.e. within three months and a further period of thirty days on sufficient cause being shown and not thereafter. Whether incorporation of additional grounds by way of amendment in the application under Section 34 tantamounts to filing a fresh application in all

2 (2010) 4 SCC 518

situations and circumstances. If that were to be treated so, it would follow that no amendment in the application for setting aside the award howsoever material or relevant it may be for consideration by the court can be added nor existing ground amended after the prescribed period of limitation has expired although the application for setting aside the arbitral award has been made in time. This is not and could not have been the intention of the legislature while enacting Section 34."

"32. It is true that, the Division Bench of the Bombay High Court in *Vastu Invest & Holdings (P) Ltd* held that independent ground of challenge to the arbitral award cannot be entertained after the period of three months plus the grace period of thirty days as provided in the proviso to sub-section (3) of Section 34, but, in our view, by "an independent ground" the Division Bench meant a ground amounting to a fresh application for setting aside an arbitral award. The dictum in the aforesaid decision was not intended to lay down an absolute rule that in no case an amendment in the application for setting aside the arbitral award can be made after expiry of period of limitation provided therein."

According to him, since Petitioner is only amplifying the existing pleadings, Petitioner is entitled to seek amendment of the pleadings and as such, order impugned is not sustainable. He would also rely on the judgment of the Apex Court in the matter of *Venture Global Engineering vs. Satyam Computer Services Limited and Anr.*[3], particularly paras 13 and 14 which read thus:

> "13. In the course of argument before this Court, Mr. Harish N. Salve, learned Senior Counsel appearing for the respondents did not make any attempt to defend the order of the High Court on the question of limitation as the learned counsel was obviously conscious of the decision of this Court in *State of Maharashtra vs. Hindustan Construction Co. Ltd.* [(2010) 4 SCC 518]. This Court in the *Hindustan Construction* made it clear that it cannot be the intention of the legislature to shut out amendments, as a result of which incorporation of relevant materials in a pending setting-aside proceeding is prevented."

3 (2010) 8 SCC 660

> "14. In *Hindustan Construction* [(2010) 4 SCC 518] this Court considered the provision in Section 34(2)(b) of the A&C Act, 1996 and while considering the ambit of the expression "the Court finds that" in Section 34(2)(b), this Court opined that where application under Section 34 has been made within the prescribed time, leave to amend grounds, in such an application, if the peculiar circumstances of the case and the interest of justice so warrant, can be granted. In saying so, this Court in SCC para 31 : AIR para 25 of the Report, relied on the decisions of this Court in *L.J. Leach & Co. Ltd. v. Jardine* and held that where it is required in the interest of justice, the Court always has the power to grant leave to amend and this power to grant an amendment is not affected under Section 34."

As such, sum and substance of the submissions of Shri Gite is, amendment is very much permissible which does not change nature of the grounds and pleadings already raised and which are in the nature of amplifying the existing pleadings.

5] While countering the aforesaid submissions, Dr. Tulzapurkar, learned Senior Counsel, would invite attention of this Court to the judgment of the learned Single Judge of this Court in the matter of *Inox Leisure Ltd. vs. Goa State Infrastructure Development Corporation Ltd.*[4] Dr. Tulzapurkar would urge that no new grounds could be permitted to be added. He would draw support from the observations in paras 13 and 14 of the said judgment which read thus:

> "13. Thus, question before this Court is whether ground sought to be added is a new ground or it is further elaboration or amplification on grounds already pleaded. Learned P.D.J. in order dated 07/09/2013 has not found it to be a new ground. On the contrary, its conclusion is "It is thus evident that though not expressly stated, the ground of bias was already raised in the application. By the proposed amendment, the applicant has only sought to include further particulars/instances to bolster the ground of bias. Hence, I am unable to accept the contention that the applicant has sought to introduce a new ground after expiry of limitation."
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> "14. The ground added is ground (EE) which states that Arbitrator acted with bias and ground bases itself upon observations made by arbitrator in paragraphs 7, 9 and 12 of the award. Thus paragraphs are also added as part

4 2015(2) Mh.L.J. 38

of ground (EE). Thereafter there are other grounds i.e. ground (FF), (GG), (HH), (II), (JJ) and (KK). When all later grounds are perused, it is apparent that it is in furtherance of ground (EE) and paragraphs 7, 9 and 12 in arbitration award. Whether the words employed by the arbitrator in 07/09/2012 are intemperate or improper words sufficient to indicate any bias or then whether bias, if any, resulting there from is sufficient to vitiate the entire award are questions not relevant at this stage. In application under Section 34 of 1996 Act, in paragraph 11, the respondent has pleaded that it had sought to amend the statement of defence before Arbitrator but Arbitrator did not consider their application and refused to hear their Advocate solely on the ground of delay. They have further stated in paragraph 12 thereof that arbitrator in his award attributed certain submissions to the advocate of applicant and that such submissions were never made. The application under Section 33 was made on 25/01/2010 before the said arbitrator for deleting said observations but arbitrator did not accept it on record on a ground that its previous notice was not given to the other side. Present respondent in said paragraph 12 has pleaded that their legal assistant submitted before arbitrator that such notice was duly served but the arbitrator refused to believe the legal assistant and did

> not take the application on record. In ground "C" again rejecting application for amendment has been commented upon by pointing out that said rejection was supported by arbitrator by giving some reasons in final award. It is contended that such conduct was not only perverse or arbitrary but constituted misconduct of arbitration proceedings. In ground (D) and (E) again certain procedural lacunae have been pointed out. In ground (S), reliance upon deposition of Mr. Sandeep Chodankar after labeling him as most untrustworthy witness by arbitrator is again assailed as misconduct. In ground (CC) it is alleged that arbitrator applied different yardsticks while appreciating admissions from parties. Efforts in said grounds appear to be to demonstrate the absence of impartiality in learned arbitrator."

He would also rely on the judgment of this Court in the matter of *Pushpa P. Mulchandani and Others vs. Admiral Radhakrishin Tahilani (Retd) and others*[5], particularly para 29 which reads thus:

> "29. Mr. Chagla further contended that an application for setting aside the award under section 34 of the 1996 Act has to be made within the limitation prescribed by the Act. This necessarily

5 2000(4) Mh.L.J. 819

> means that all grounds on which the award is sought to be set aside have to be taken in the petition itself. It is, therefore, not permissible for the Court to permit an amendment of the petition, that too after the period of limitation prescribed in the section has expired. That would tantamount to entertaining a fresh petition beyond the period of limitation. *AIR 1967 1233, Madan Lal (dead) by his legal representative v. Sunder Lal and another*, is pressed into service in support of the proposition that an objection to the award which has been filed after the period of limitation cannot be treated as an application to set aside the award if it is filed beyond limitation. The contention is justified and needs to be upheld."

As such, he would further claim that nature of pleadings earlier raised and one which is sought to be inserted through amendment are required to be appreciated to mean that the Petitioner intends to add additional grounds. According to him, application is rightly rejected vide impugned order and as such, sought dismissal.

6] Considered submissions.

7] The fact about challenge of Award before learned District Judge under Section 34 of the Act is not in dispute. The said application under Section 34 was moved well within time and specific grounds are raised that arbitral award is based on incorrect drawing of issues and in the absence of material evidence thereon. By virtue of application for amendment-Exhibit-95, present Petitioner has sought insertion of following pleadings:

> "i) Para 2-A: Because the impugned award passed by learned sole arbitrator, non-applicant No.2 is clearly contrary to the mandatory provisions of Arbitration and Conciliation Act, 1872, Indian Evidence Act, as well as contrary to the written agreement between the parties.
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> ii) Para 2-B:- Because the learned sole arbitrator while passing the impugned award failed to take into consideration the undertakings given by the non-applicant No.1 for obtaining the extension of time limit and although the said undertakings were before learned arbitrator but while passing the impugned award ignored the said undertakings which clearly amounts mis-conduct on the part of learned arbitrator / non-applicant No.2.
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> iii) Para 2-C:- Because the learned sole arbitrator while

passing the impugned award if he would have taken into consideration the undertakings given by the claimant/contractor dated 14/2/1998 at the time of first extension and undertaking given at the time of second extension, and by the said undertakings the claimant/contractor undertaken that if extension of time limit will be granted, the claimant will not claim revision of rates and in the second undertaking for extension, it has been undertaken that if the extension of time limit will be grantted it will not claim any financial and non-financial losses including price variation and in view of these two undertakings referred above the claimant / contractor is estopped from claiming any amount by way of price escalation or revision of rates and in the present case principle of estoppel is clearly attracted and this legal aspect was completely ignored by the sole Arbitrator.

iv) Para 2-D :- Because the Non-applicant No.1, claimant/contractor accepted the final measurement without any demur or protest long back and in view of this factual position also the claimant has waived its rights to claim any additional amount from the applicant/ corporation.

v) Para 2-E :- Because the learned Sole arbitrator while passing the impugned award clearly ignored the undertakings given by the non-applicant No.1 while seeking extensions of time limit and as by the said undertakings the non-applicant No.1 contractor on its own given up its own rights to claim any amount from the applicant and therefore awarding of compensation by the Arbitrator for which claimant contractor has undertaken not to claim any amount and therefore this act, on the part of the learned arbitrator clearly amount misconduct and it is also contrary to the written contract between the parties therefore same is impermissible in Law.

vi) Para 2-F :- Because the claimant has claimed total amount of Rs 77,05,51,345/- against the contract amount, including contract rate quoted 70% above which comes at Rs 3,31,19,443/- and if the original contract value and the payment of final bill taken into consideration including price escalation the claims raised by the claimant contractor are clearly false and bogus and as the applicant department has already paid price escalation and also paid revision of rates in the final bill if same are taken into consideration total amount from Ist R.A. Bill to final bill comes at **Rs 4,38,24,227/**- and in view of this position also the claims raised by the non-applicant No.1 are apparently incorrect and false and these important aspects have been over looked by learned sole arbitrator while passing award and therefore same is patently illegal.

vii) Para 2-G :- Because in the contract between the parties even if clause **8.B page 32** is taken into consideration it clearly says that the applicant department is entitled to recover advances amount given to contractor by charging interest at the rate if 14 percent per annum and in the contract there is prohibition for making payment of interest on any amount due and payable to the contractor and in view of this position also awarding of interest by the learned arbitrator at the rate of 18 percent per annum & 18 percent monthly rests (compound) is clearly contrary to the terms in the written contract as well as contrary to law and therefore on this count alone impugned award deserves to be quash and set aside.

viii) Para 2-H :- Because in view of undertakings given by the non-applicant contractor not to claim any amount during the extension period if extension will be granted and in view of the said undertakings award of damages under claim No.1 with interest by the non-applicant no.2 is clearly un-sustainable and illegal and therefore same is liable to be quash and set aside by this Hon'b le Court.

ix) Para 2-I :- Because in view of the undertakings given by the non-applicant no.1 and also in view of the payment made under clause 31 that is variation in quantity, the learned arbitrator was not justified in allowing claim no.2 and 4 partly with exorbitant rate of interest at 18% p'a. & 18% monthly rests (compound).

x) Para-J : Because the non-applicant no.1 was absolutely not entitled to get any amount in respect of claim no.6 because as per the terms of contract the amount of performance security is to be released after the defect liability period is over and as the said amount of deposits was released immediately after the defect liability period was over and therefore inclusion of this claim with exorbitant rates of interest and its inclusion in claim no.3 is kersey illegal.

xi) Para 2-K :- Because awarding of claim no.8 partly is also contrary to the undertakings given by non-applicant no.1 while seeking extensions and therefore on this count also the award deserves to be quash and set aside.

xii) Para 2-L(A) Because the learned Abritrator has purposely wrongly interpreted the Clause No.33 Page No.42 to 45 of the contract agreement for payment of price escalation and accordingly awarded arbitrarily excess amount of Rs 2,21,32,378/- in favour of the claimant. The learned arbitrator has passed the award against public policy of India. It proves that the learned arbitrator has passed the award is in conflict with the public policy of India as the making of the award was induced of affected by **fraud and/or corruption.** Hence on this count only entire award passed by the arbitrator is liable to be set aside.

(B) Because claim no.10 is again contrary to clause 33 of the contract as implication of price escalation formula is not done by arbitrator as explained in cl.33 on page no.41 to 45 of tender. Also when the extension of time limits were granted on undertakings of the non-applicant no.1 that non-applicant will not claim any additional amount and as already huge amount of price escalation of Rs 43,63,174/- was paid during running bills and the same was also accepted by the non-applicant no.1 without any protest and therefore after accepting final bill the non-applicant No.1 is not entitled to claim anything.

xiii) Para 2-M :- Because the claimant contractor is also not entitled to claim any compensation for alleged over breakages in excavation and concreting and therefore the awarding of the said claim no.11 with interest rate of interest at 18% p'a. & 18% monthly rests (compound) is again illegal.

xiv) Para 2-N :- Because awarding of claim No.17 by the learned arbitrator with rate of interest at 18% p.a. & monthly rests (compound) is again illegal and in fact claimant is not entitled to get the same.

xv) Para 2-O :- Because awarding of interest at the rate 18% p.a. & 18% monthly rests (compound) is clearly violation of written contract between the parties because in the contract there is no provision for making payment of interest on alleged amount due and payable at compounding rates and as there is prohibition in the agreement for award of compound interest. Also there is no provision of compound interest in Arbitration and Conciliation Act 1996, and in view of this legal position also award is clearly illegal and without jurisdiction and therefore deserves to be quashed and set aside.

xvi) Para 2-P :- Because the learned arbitrator ignored the oral testimony of the director of the company who has clearly made admissions contrary to the pleadings and therefore by observing on page 14 of award in Para No.1. The learned arbitrator ignored the important piece of evidence while passing the impugned award and therefore on this count itself the award passed by the learned arbitrator is liable to quash and set aside by this Hon’ble Court.

xvii) Para 2-Q :- Because awarding of interest by the learned sole arbitrator more than the interest allowable on machinery advances and in the absence of provision in the contract to that effect is clearly contrary to the mandate of section 31(7) of Arbitration and Conciliation Act, 1996.

xviii) Para 2-R:- Because the impugned award is clearly contrary to mandate of law and also clearly contrary to the public policy and therefore in view of the mandate of section 34(2)(iv)(v)(b)(i)(ii) the impugned award deserves to be quash and set aside by this Hon’ble Court.”

The nature of pleadings which are sought to be inserted are in the form of grounds which are based on legal provisions such as Indian Contract Act, Indian Evidence Act and the provisions of Arbitration and Conciliation Act. Some of the pleadings are also based on an undertaking given by the Respondent No.1 during execution of the work while seeking extension of time for completion of work which was factually ignored by the Arbitrator. It is also based on acceptance of final measurement without any protest by the award holder. Amendment also speaks of award of excess rate of interest in the Arbitration Award.

8] If the amendment sought is appreciated in the light of pleadings in the main application preferred under Section 34 of the Act, pleadings in the said application prompts this Court to conclude that the amendment is for amplification and does not change, in any way, nature of pleadings. The grounds in the application under Section 34 of the Act in terms speak of compressed plea/grounds which are sought to be amplified by way of amendment. To name a few, in application under Section 34, the ground as regards non-compliance of provisions of the Arbitration and Conciliation Act, Indian Contract Act, and Evidence Act is specifically raised. The issue as regards non-adherence to the terms of contract is also raised.

9] Apart from above, it is required to be noticed that Arbitration Proceedings under Section 34 which are preferred by the Petitioner before he learned District Judge will be decided on its own merits.

However, grounds which are raised by way of amendment are based on legal provisions and evidence considered by the Arbitrator while delivering award. The grounds which are raised are in tune with the defence which was raised by the Petitioner before the Arbitrator while opposing the claim put-forth. As such, it has to be inferred that if amendment is permitted, Respondent No.1 will not be taken by surprise. The amendment does not include new grounds but it is just an elaboration and amplification of existing grounds raised. It is further required to be observed that plea that was raised under sub-section (6) of Section 16 of the Act is taken into account while drafting the application for amendment.

10] In the aforesaid backdrop, learned Counsel for the Petitioner is justified in inviting attention of this Court to the judgment of the Apex Court in the matter of *State of Hindustan Construction Company Limited* cited supra, particularly para 29 and 32 and also judgment in the matter of *Venture Global Engineering* cited supra, particularly paras 13 and 14.

11] In the aforesaid backdrop, in my opinion, order impugned is not sustainable and same is liable to be quashed and set aside and it is accordingly quashed and set aside. Application-Exhibit-95 stands allowed, subject to payment of costs of Rs 1 lakh to be deposited in the court below within a period of six weeks from today. Upon deposit of such payment of cost, Petitioner will be at liberty to carry out amendment. If costs is not deposited, order rejecting application for amendment shall govern the field.

12] Petition, as such, stands allowed in the aforesaid terms and disposed of.

13] After the order is pronounced, learned Counsel for the Respondents seeks stay of the order for a period of four weeks, which request is opposed by learned Counsel for the Petitioner. However in the interest of justice order is stayed for a period of three weeks.

(NITIN W. SAMBRE, J.)